IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE A.K.BASHEER
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 24TH OCTOBER 2007 / 2ND KARTHIKA 1929

WP(C).No. 9252 of 2006(B)

PETITIONERS:
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1. **NATARAJAN, SON OF NEELAKANTA PILLAI,**
   AGED 52 YEARS, MANAGING PARTNER, T.C.26/125,
   M/S. CENTRAL MEDICAL STORES, M.G. ROAD,
   THIRUVANANTHAPURAM.

2. **K.M. HANEEFA, AGED 70 YEARS,**
   TC.27/127, PROPRIETOR, KALAMANDIR STUDIO,
   M.G. ROAD, THIRUVANANTHAPURAM.

BY ADV. SRI.V.SURESH,
ADV. SRI.G.SUDHEER.

RESPONDENTS:
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1. **STATE OF KERALA,**
   REPRESENTED BY CHIEF SECRETARY TO THE GOVERNMENT,
   THIRUVANANTHAPURAM.

2. **DISTRICT COLLECTOR,**
   COLLECTORATE, THIRUVANANTHAPURAM.

3. **TRIVANDRUM DEVELOPMENT AUTHORITY,**
   TRIDA BUILDINGS, THIRUVANANTHAPURAM.

4. **SPECIAL TAHSILDAR (LAND ACQUISITION),**
   THIRUVANANTHAPURAM.

W.P.(C). NO.9252/2006:

5. SUNNY P. JOSE, SON OF P.P.JOSE,
TC.11/1154 (1), CLIFF HOUSE ROAD,
NANTHENCODE, THIRUVANANTHAPURAM.

BY ADV. SRI.K.A.JALEEL, SC., TRIDA,
SRI.V.CHITAMBARESH,
SRI.T.C.SURESH MENON,
SRI. P.C. SASIDHARAN, SC, KPSC.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 24/10/2007,ALONG WITH W.P.(C). NO. 9267/ 2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & T.R.RAMACHANDRAN NAIR, JJ.

W.P.(C).NO.9252 OF 2006
and
W.P.(C).NO.9267 OF 2006

Dated this the 20th day of March, 2007.

REFERENCE ORDER

Koshy, J.

Petitioners in this case are tenants of a building situated in Thiruvananthapuram city. Part of the building was sought to be acquired by the State for widening of the road. The landlord exercised the option under Section 49(1) of the Land Acquisition Act, for acquiring the entire building. It was held in the Division Bench of this court in *Mohammed vs. Project Director* (1993 (1) KLT 730) that once the landlord expressed his option to purchase the entire building, state is bound to accept the same or withdraw from the acquisition itself. Effect of Section 49(1) is discussed in para 12 of judgment in *M/s Harsook Das Bal Kishan Das vs. The First Land Acquisition Collecotr and Others* (1975 (2) SCC 256). Similarly, in para 10 of *State of Bihar vs. Kundan Singh* (AIR 1964 SC 350) after quoting the section, Apex Court observed as follows:-

> The provisions of Section 49(1) prescribe, inter alia, a definite prohibition against putting in force any of the provisions of the Act for the purpose of acquiring a part only of any house, if

the owner desires that the whole of such house shall be acquired. This prohibition unambiguously indicates that if the owner expresses his desire that the whole of the house should be acquired, no action can be taken in respect of a part of the house under any provision of the Act, and this suggests that where a part of the house is proposed to be acquired an a notification is issued in that behalf, the owner must make up his mind as to whether he wants to allow the acquisition of a part of his house or not. If he wants to allow the partial acquisition, proceedings would be taken under the relevant provisions of the Act and an award directing the payment of adequate compensation would be made and would be followed by the taking of possession of the property acquired. If, on the other hand, the owner desires that the whole of the house should be acquired, he should indicate his desire to the Land Acquisition Officer and all further proceedings under the relevant provisions of the Act must stop. This provision thus seems to suggest that if an objection is intended to be raised to the acquisition

of a part of the house, it must be made before an award is made under Section 11. In fact, it should be made soon after the initial notification is published under Section 4; otherwise, if the proceedings under the relevant provisions of the Act are allowed to be taken and an award is made it would create unnecessary confusion and complications if the owner at that stage indicates that he objects to the acquisition of a part of his house; at that stage, it would no doubt be open to him to claim adequate compensation in the light of the material provisions of Section 23 of the Act, but that is another matter.

11. The first proviso to Section 49(1) also leads to the same conclusion. If the owner has made Ins objection to the acquisition of a part of his house, it is open to him to withdraw or modify his objection before an award is made under Section 11 and if he withdraws his objection, further proceedings will follow and if he modifies his objection, steps will have to be taken as indicated in the other provisions of Section 49. This proviso, therefore, suggests that the objection

of the owner to acquisition of a part of his house has to be considered and dealt before an award is made under Section 11.

12. It would be noticed that if an objection is made by the owner under Section 49 (1), the Collector may decide to accept the objection and accede to the desire of the owner to acquire the whole of the house. In that case, further proceedings will be taken on the basis that the whole of the house is being acquired. In some cases, the Collector may decide to withdraw acquisition proceedings altogether, because it may be thought not worthwhile to acquire the whole of the house; in that case again, nothing further remains to be done and the notification issued has merely to be withdrawn or cancelled. But cases may arise where the Collector may not accept the claim of the owner that what is being acquired is a part of the house; in that case, the matter in dispute has to be judicially determined, and that is provided for by the second proviso to Section 49 (1). Under this proviso, the Collector is under an obligation to refer the matter to the Court and he

> shall not take possession of the land under acquisition until the question is determined by the Court. In dealing with this matter, the Court has to have regard to the question as to whether the land proposed to be taken is reasonably required for the full and unimpaired use of the house.

2. Various Division Bench decisions were also cited to show that it is for the owner to take exercise the option. Collector has either to accept the option and acquire the entire building or can withdraw from acquisition or refer the matter to the court under second proviso to Section 49(1). In exercising the option under Section 49(1), the tenant has no voice, as held by the Division Bench of this Court in *Shamsudheen vs, District Collector* (2000 (3) KLT 16). Several Division Bench decisions to the same effect were placed before us. Here in this case Collector accepted the option made by landlord. But in a Writ Petition filed by the tenant, a Division Bench of this court took a different view. In *Shaji C.Varkey vs. Collector* (2007(1) KLT 790) wherein it was stated that once land lord exercise the option to acquire land, it was for the Collector to decide whether the entire building is to be acquired or only part of the building to be acquired. A reading of Section 49(1) and decision of Supreme Court in Kundan Singh's case (supra), would show that Collector has no such power. Collector can

either accept the option or withdraw from the acquisition itself. He can also refer the matter to the court and Collector cannot take possession of the building, till court decides the issue. Contrary view expressed by the Division Bench in Shaji.C.Varkey's case (supra), appears to us is against the earlier decisions of this court and Supreme Court as well as the plain wording of section 49(1). In any event tenant has no right to question the option exercised by landlord under Section 49(1) in a Writ Petition. Hence we are of the view that decision in Shaji's case (supra) requires reconsideration by a larger bench.

3. According to the counsel for the landlord, his client only opted to acquire the entire building and the land portion cannot be acquired. We are of the opinion that under Section 49(1) , when steps are taken to acquire part of the building, owner can insist to acquire the 'entire building' including appurtenant land also. According to us landlord cannot insist for building materials alone should be acquired and the State should demolish the building at its expenditure and remove the building materials after paying compensation. According to us the when land lord exercises the option under Section 49(1), state can acquire the entire building and decide either to demolish that part of the building or use it with or without necessary modifications.

The definition of land as well as decision of the Apex Court in *M/s Harsook Das Bal Kishan Das vs. The First Land Acquisition Collecotr and Others* (1975 (2) SCC 256) show that the land including the building has to be acquired. The learned counsel for the land acquisition officer referred to the decision of the Full Bench in *Rajalakshmy vs. Assistant Engineer and others* (AIR 1980 Kerala 68 Full Bench). In that case majority of the judges held that when building alone is acquired, an order can be passed by the court for removal of the building materials by the Government. But in that case Government acquired only the building materials and the question when the building is acquired, whether appurtenant land also to be acquired, has not been considered. We are of the prima facie view that when the land lord exercise the option under Section 49(1), Government is bound to acquire the entire building. Building cannot be acquired without that portion of the land where building is situated. Thereafter it is for the Government to decide whether the entire building is to be demolished or not. Since we have expressed doubt of correctness in the decision in Shaji's case, we are of the opinion that this question also should be decided by a Full Bench of this court. We are of the opinion that an authoritative decision is necessary from the Full Bench with respect to the following three questions:-

1. Has Collector vested with power to reject the claim under Section 49(1) put forward by the owner to acquire entire building and proceed with acquisition of part of the building without court interventions?

2. Whether Tenant can file a Writ Petition challenging the action taken by the Collector when the option under Section 49(1) is exercised by the landlord?

3. When the Collector accepted the option to acquire the entire building, whether only building materials are to be acquired or the entire building including the land where it is situated also need be acquired?

Hence we adjourn this case for placing the matter before the Hon'ble Chief Justice for appropriate orders.

J.B.KOSHY, JUDGE.

T.R.RAMACHANDRAN NAIR, JUDGE.

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